Office Supreme Court, U. S.
FILED
SEP 22 1955
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 156

ELMER E. REMMER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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ported to the District Court by a juror[4] was harmful to appellant, and if after hearing it was found to have been harmful, to grant a new trial.

Accordingly, the District Court (Judge Louis E. Goodman presiding) held a hearing, and Judge Goodman, on July 10, 1954, filed his opinion, findings and order, thereby finding and determining that the incident was harmless to appellant. A certified copy of Judge Goodman's opinion, finding and order having been transmitted to the clerk of the Supreme Court, and appellant having moved the Supreme Court for leave to file a petition for rehearing, the Supreme Court, on January 10, 1955, made the following order:[5]

"The motion for leave to file and the petition for rehearing are granted. This case is restored to the docket, and the whole record, including the findings and order of Judge Goodman, is remanded to the Court of Appeals for its consideration on the errors assigned when the case was before the Court of Appeals before, in order that the Court on the whole record may reconsider the case in the light of our recent decisions in Holland v. United States, 348 U.S. 121; Friedberg v. United States, 348 U.S. 142; Smith v. United States, 348 U.S. 147; and United States v. Calderon, 348 U.S. 160, and Judge Goodman's findings and order."

We have complied with the Supreme Court's order and have concluded that our decision of May 28, 1953, and Judge Goodman's findings and order were correct. The

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[4]The incident was described in our opinion (205 F. 2d 277, 291) and in the Supreme Court's opinion (347 U.S. 227, 288).

[5]Remmer v. United States, 348 U.S. 904.

judgment affirmed by us on May 28, 1953, is, therefore, again affirmed.

(Endorsed:) Per Curiam Opinion. Filed May 23, 1955.

Paul P. O'Brien, Clerk.

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This reply brief is filed to call attention to several important cases decided since the Petition for *Certiorari* was printed, and also to point out certain incorrect statements in the Brief for the United States in Opposition.

I.

The Brief for the United States incorrectly declares (p. 14) that the questions raised in the Petition with

respect to the denial to petitioner of an opportunity to inspect certain of his records held by the Government were not within the terms of this Court's order remanding the case to the Court of Appeals. The remand of this Court on January 10, 1955, specifically declared that the entire matter was being remanded to the Court of Appeals

> "* * * for its consideration on the errors assigned when the case was before the Court of Appeals before * * *"

Remmer v. United States (1955), 348 U.S. 904.

It is clear, therefore, contrary to the Government's position, that these important questions which this Court did not find it necessary to decide before were covered by the remand to the Court of Appeals and are properly presented at this time.

II.

The Brief for the United States fails to state that its petition for rehearing in the *Bloch* case, mentioned in our Petition (p. 48, fn. 8), was denied by the Court of Appeals for the Ninth Circuit on June 14, 1955, in an opinion which reaffirms that an instruction on willfulness virtually identical with Instruction No. 19 in this case was such plain and fundamental error as to require reversal even in the absence of an exception in the trial Court. See *Bloch v. United States* (CA 9, June 14, 1955), 223 F. 2d 297, affirming original decision reported in 221 F. 2d 786.

In contrast with its silent avoidance of the *Bloch* decision here, the Government has previously argued

to the Ninth Circuit that *Bloch* was contrary to its earlier decision in the *Remmer* case. See Supplemental Brief for Appellee, dated April 25, 1955, in *Herzog v. United States*, Ninth Circuit No. 14,611, which includes the following in its statement of reasons why the *Bloch* decision should not be followed (p. 7, fn. 1):

> "While *Remmer v. United States*, 205 F. 2d 277, has not been finally decided, an instruction appears therein at page 140 of the record in somewhat similar language. This Court, affirming the conviction, approved the instructions in their entirety."

The *Herzog* case, which involves an instruction on willfulness substantially identical with that given in *Bloch* and *Remmer*, has not yet been decided.

The Eighth Circuit declined to follow the *Bloch* decision in *Banks v. United States* (June 28, 1955), 223 F. 2d 884.

Thus, not only is there a conflict between circuits on this important question, but within the Ninth Circuit itself different panels of judges have reached diametrically opposite conclusions; and the opinion in this case does not even mention the *Bloch* case, although it was called to the Court's attention in our Supplemental Brief filed after the remand, and the cases are not distinguishable.

III.

With regard to the net worth issues, two additional opinions in conflict with the decision below have been handed down since our Petition was printed.

In *Scanlon v. United States* (June 13, 1955), 223 F. 2d 382, 389, the Court of Appeals for the First Circuit held that the Government's net worth computations involving a cash-basis taxpayer properly excluded "such items as accounts receivable and accounts payable, which are not attributable to the defendant's current income (income being that income which is reportable by a taxpayer on a cash basis)." This holding is contrary to the inclusion in this case of the accounts receivable of the B-R Smoke Shoppe in petitioner's closing net worth. See Petition, pages 41-4.

The decision of the Court of Appeals for the Second Circuit in *United States v. Altruda* (August 2, 1955), ... F. 2d ....., 55-2 USTC Par. 9592, creates a conflict with the decision of the Court below in still another respect. The *Altruda* case holds that it is reversible error for the Government to include technical adjustments in its net worth computations in a criminal tax evasion case for the reason that this can confuse the jury by implying that the entire amount of additional income computed in this manner is attributable to fraud. In that case, the Government's basic net worth exhibit showed unreported income for the year in question of $8,978.09. Of this amount, $5,788.22 consisted of nonfraudulent adjustments. Even though the fact that this portion of the understatement consisted of technical adjustments was set forth in another Government exhibit, the Court set aside the conviction because the principal net worth exhibit was misleading. As pointed out in our Peti-

tion (pp. 39-40), all but $7,000.00 of the total understatement of $43,494.95 computed by the Government in this case consisted of technical accounting-type adjustments which obviously would not support any inference of fraud. And unlike the *Altruda* case, there was no explanation, even in a separate exhibit, that the Government's case rested almost completely on these technical adjustments.

IV.

The discussion of the extraneous jury contacts in the Brief for the United States in Opposition shows how completely the Government misconceives its burden of proof in this kind of a situation. For example, in commenting on our point that Smith was never questioned regarding Satterly's remarks about the alleged "under the table" payments made to petitioner on the sale of Cal-Neva Lodge, the Government states as follows (Br. U.S., p. 13, fn. 14):

> "If petitioner felt that this was important, he could have had Smith recalled to the stand for further cross-examination. He did not even suggest this during the proceedings before Judge Goodman."

The fallacy of this argument, of course, is the assumption that the burden was on petitioner to show that these extraneous allegations that he was a tax evader were harmful to him. As this Court pointed out in its previous opinion, however, any such extraneous communication raises a presumption of prejudice

which the Government must overcome. Since the Government did not choose to develop the facts of these highly prejudicial remarks while Smith was on the stand (although its own files contained the FBI memorandum showing that the remarks had been made), and since the Government did not choose to recall Smith for development of further evidence on this point after interrogation of the FBI agent disclosed the fact of this communication, the record is completely devoid of any explanation, and there is accordingly no evidentiary basis whatsoever for the holding that these remarks to the jury foreman were harmless.

Indeed, it is understandable why the Government did not question juror Smith on this matter, for what could he have said that would prove that these obviously prejudicial remarks had no effect on him? Had the Government brought this matter to the attention of petitioner during the trial so that the falsity of Satterly's accusations could have been demonstrated to Smith, there would possibly have been a basis for contending that Smith could continue serving as a juror without prejudice to petitioner. However, since no effort whatsoever was made during the trial to contradict Satterly's statements or to overcome the effect of them, we see no possible basis for contending that this conversation resulted in no prejudice to petitioner.

The Government now concedes that juror Smith at least "had some lingering doubt" as to whether Sat-

terly's remark was simply a joke.* But the Government points to no evidence which shows that this "lingering doubt" was ever overcome. After the FBI agent had interviewed Smith and reported back to the prosecutor and the judge, no further contact was made with Smith, and at no time was he given any information which would throw any light whatsoever on the question of whether Satterly had really been joking rather than feeling Smith out for a possible bribe.

The conclusion that this series of incidents was harmless to petitioner is based purely on conjecture and is not supported by any evidence whatsoever showing that the prejudicial impact of these communications had been overcome. The fact is that the Government made no effort to overcome the impact of these communications, and petitioner himself had no opportunity to do so because the facts were concealed from him by the trial judge and the prosecutors.

The Government's attempt (Br. U.S., p. 14, fn. 15) to distinguish *Stone v. United States* (CA 6, 1940), 113 F. 2d 70, rests on differences in unimportant factual details and ignores the basic principles so clearly set forth in the opinion. In the *Stone* case, the conviction was reversed even though the trial

*The Government brief erroneously states (p. 12) that the conversation between Smith and Satterly was carried on "with no change of tone". The fact is that, according to Smith's wife, who had been paying no attention to the conversation between Smith and Satterly up to that point, Smith raised his voice in informing Satterly that he was forbidden from discussing the case. (Supp. R. 128.)

Court had informed defense counsel of what had occurred and had made a serious effort to impress the juror with the fact that he should rid his mind of any possible prejudice against the defendant. In the *Remmer* case, two jurors carried in their minds throughout the case the possibility that the defendant was seeking to bribe a juror, and one of them, in addition, carried the statement by a purported friend of petitioner that petitioner had evaded his taxes on the sale of Cal-Neva Lodge.

The absence of any effort to neutralize the impact of these extraneous statements leaves no evidentiary support in the record for the contention that there was in fact no harm to petitioner.

Dated, September 19, 1955.

Respectfully submitted,

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